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Bell Canada *v.* Canadian Telephone Employees Association, [2003] 1 S.C.R. 884, 2003 SCC 36

Bell Canada *Appellant*

v.

Communications, Energy and Paperworkers Union of Canada,

Femmes Action and Canadian Human Rights Commission *Respondents*

and

Attorney General of Canada, Attorney General of Ontario,

Canadian Labour Congress, Public Service Alliance of Canada and

Canada Post Corporation *Interveners*

Indexed as: Bell Canada *v.* Canadian Telephone Employees Association

Neutral citation: 2003 SCC 36.

File No.: 28743.

2003: January 23; 2003: June 26.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and

Deschamps JJ.

on appeal from the federal court of appeal

Administrative law — Procedural fairness — Institutional independence — Impartiality — Canadian Human Rights Tribunal — Canadian Human Rights Commission — Canadian Human Rights Act authorizing Commission to issue guidelines binding on Tribunal concerning "a class of cases" — Act also authorizing Tribunal Chairperson to extend terms of Tribunal members in ongoing inquiries — Whether Commission's guideline-making power compromises Tribunal's independence and impartiality — Whether Chairperson's power to extend appointments compromises Tribunal's independence and impartiality — Canadian Human Rights Act, R.S.C. 1985, c. H-6, ss. 11, 27(2), 48.2(2) — Canadian Bill of Rights, S.C. 1960, c. 44, s. 2(e).

Bell brought a motion before a panel of the Canadian Human Rights Tribunal, which had been convened to hear complaints filed against Bell by female employees. Bell alleged that the Tribunal's independence and impartiality were compromised by two powers: first, the power of the Canadian Human Rights Commission to issue guidelines that are binding on the Tribunal concerning "a class of cases", and second, the power of the Tribunal Chairperson to extend Tribunal members' terms in ongoing inquiries.

The Tribunal rejected Bell's position and directed that the hearings should proceed. The Federal Court, Trial Division, allowed Bell's application for judicial review, holding that even the narrowed guideline power of the Commission unduly fettered the Tribunal, and that the Chairperson's discretionary power to extend appointments did not leave Tribunal members with a sufficient guarantee of tenure. The Federal Court of Appeal reversed that judgment.

Held: The appeal should be dismissed.

Neither of the two powers challenged by Bell compromises the procedural fairness of the Tribunal. Nor does either power contravene any applicable quasi-constitutional or constitutional principle.

The Tribunal should be held to a high standard of independence, both at common law and under s. 2(*e*) of the *Canadian Bill of Rights*. Its main function is adjudicative and it is not involved in

crafting policy. However, as part of a legislative scheme for rectifying discrimination, the Tribunal serves the larger purpose of ensuring that government policy is implemented. The standard of independence applicable to it is therefore lower than that of a court. The Tribunal's function in implementing government policy must be kept in mind when assessing whether it is impartial.

The guideline power does not undermine the independence of the Tribunal. The requirement of independence pertains to the structure of tribunals and the relationship between their members and members of other branches of government. It does not have to do with independence of thought. Nor does the guideline power undermine the Tribunal's impartiality. The guidelines are a form of law. Being fettered by law does not render a tribunal partial, because impartiality does not consist in the absence of all constraints. The guideline power is limited; and the statute and administrative law contain checks to ensure that it is not misused.

The power to extend members' appointments does not undermine the independence of Tribunal members. This question is settled by *Valente*. Nor does the power undermine the Tribunal's impartiality. A reasonable person informed of the facts would not conclude that members whose appointments were extended were likely to be pressured to adopt the Chairperson's views.

Cases Cited

Referred to: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *Canada (Attorney General) v. Central Cartage Co.*, [1990] 2 F.C. 641; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Canada (Attorney General) v. Public Service Alliance of Canada*, [2000] 1 F.C. 146; *Liteky v. United States*, 510 U.S. 540 (1994); *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405; *R. v. Greenbaum*, [1993] 1 S.C.R. 674; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854.

Statutes and Regulations Cited

Canadian Bill of Rights, S.C. 1960, c. 44 [reproduced in R.S.C. 1985, App. III], s. 2(*e*).

Canadian Charter of Rights and Freedoms.

Canadian Human Rights Act, R.S.C. 1985, c. H-6 [am. 1998, c. 9], ss. 11(1), (4), 27(1), (2), (3), 48.1(3), 48.2(1), (2), 48.3, 48.6(1), 50(2).

Constitution Act, 1867, s. 96.

Equal Wages Guidelines, 1986, SOR/86-1082.

Statutory Instruments Act, R.S.C. 1985, c. S-22.

APPEAL from a judgment of the Federal Court of Appeal, [2001] 3 F.C. 481, 272 N.R. 50, 199 D.L.R. (4th) 664, 32 Admin. L.R. (3d) 1, 9 C.C.E.L. (3d) 228, [2001] F.C.J. No. 776 (QL), 2001 FCA 161, allowing the respondents' appeal from a judgment of the Trial Division, [2001] 2 F.C. 392, 190 F.T.R. 42, 194 D.L.R. (4th) 499, 26 Admin. L.R. (3d) 253, 5 C.C.E.L. (3d) 123, 39 C.H.R.R. D/213, 2000 C.L.L.C. ¶230-043, [2000] F.C.J. No. 1747 (QL), quashing the decision of the Canadian Human Rights Tribunal. Appeal dismissed.

Roy L. Heenan, *John Murray*, *Thomas Brady* and *David Stratas*, for the appellant.

Peter C. Engelmann, *Jula Hughes* and *Fiona Campbell*, for the respondent the Communications, Energy and Paperworkers Union of Canada.

No one appeared for the respondent Femmes Action.

Ian Fine and *Philippe Dufresne*, for the respondent the Canadian Human Rights

Commission.

Donald J. Rennie and *Alain Préfontaine*, for the intervener the Attorney General of Canada.

Sara Blake and *Karin Rasmussen*, for the intervener the Attorney General of Ontario.

Mary F. Cornish and *Fay C. Faraday*, for the intervener the Canadian Labour Congress.

Andrew Raven and *David Yazbeck*, for the intervener the Public Service Alliance of Canada.

Brian A. Crane, *Q.C.*, and *David Olsen*, for the intervener the Canada Post Corporation.

The judgment of the Court was delivered by

THE CHIEF JUSTICE AND BASTARACHE J. —

I. Introduction

1 This appeal raises the issue of whether the Canadian Human Rights Tribunal (the "Tribunal") lacks independence and impartiality because of the power of the Canadian Human Rights Commission (the "Commission") to issue guidelines binding on the Tribunal concerning "a class of cases", and the power of the Tribunal Chairperson to extend Tribunal members' terms in ongoing inquiries.

2 The appeal marks the latest proceeding in a lengthy dispute between Bell Canada ("Bell") and the respondents, dating back to the early 1990's, when two unions, Canadian Telephone Employees Association ("CTEA") and Communications, Energy and Paperworkers Union of Canada ("CEP"), and Femmes Action filed complaints against Bell alleging gender discrimination in the payment of wages, contrary to s. 11 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "Act"). More than a decade later, the complaints have yet to be heard by the Tribunal. Instead, the parties have been

engaged in litigating Bell's challenges to the Tribunal, a process that has taken them to the Federal Court, Trial Division three times, to the Federal Court of Appeal twice, and now to this Court.

3 In our view, Bell's arguments are without merit. Neither of the two powers challenged by Bell compromises the procedural fairness of the Tribunal. Nor does either power contravene any applicable quasi-constitutional or constitutional principle. We would dismiss the appeal and have the complaints, finally, proceed before the Tribunal.

II. Background

4 Between 1990 and 1994, the CTEA, the CEP and Femmes Action, filed complaints with the Commission against Bell, alleging that Bell pays female employees in certain positions lower wages than male employees performing work of equal value, in violation of s. 11 of the Act. In May of 1996, the Commission asked the President of the Tribunal (now "Chairperson") to inquire into the complaints.

5 The matter quickly became complicated. Bell applied for judicial review of the Commission's decision to refer the complaints to the Tribunal. The Federal Court, Trial Division granted Bell's application and quashed the Commission's decision: *Bell Canada v. Communications, Energy and Paperworkers Union of Canada* (1998), 143 F.T.R. 81. On appeal, the Federal Court of Appeal reversed this judgment and restored the Commission's decision: [1999] 1 F.C. 113. Leave to appeal to this Court was sought by Bell, but was denied: [1999] 2 S.C.R. v.

6 While this was occurring, a panel of Tribunal members was appointed to inquire into the original complaints. Bell brought a motion before the panel urging that the Tribunal was institutionally incapable of providing a fair hearing in accordance with the principles of natural justice. The panel dismissed the motion: *Canadian Telephone Employees Association v. Bell Canada*, Can. H.R. Trib., June 4, 1997.

7 Bell then applied for judicial review of the panel's decision. The Federal Court, Trial Division quashed the panel's decision: *Bell Canada v. Canadian Telephone Employees Assn*, [1998] 3 F.C. 244, and ordered that there be no further proceedings in the matter until the Act had been satisfactorily amended by the legislature. At that time, the Act differed from the current legislation in two relevant respects. Firstly, it was the Minister of Justice and not the Tribunal Chairperson to whom the Act gave the discretionary power to extend Tribunal members' appointments beyond their expiry dates. McGillis J. held that, as a result, Tribunal members lacked sufficient security of tenure. Secondly, the Commission's guideline power was broader than it now is, permitting the Commission to

make guidelines concerning the application of the Act in a particular case, and not only in "a class of cases". McGillis J. expressed reservations about this power, stating that it would be preferable if the guidelines were non-binding.

8 The judgment of McGillis J. was appealed to the Federal Court of Appeal, but the appeal was adjourned *sine die* on June 1, 1999, in light of amendments to the Act: (1999), 246 N.R. 368. The amendments transferred the power to extend appointments of Tribunal members to the Tribunal Chairperson, and limited the Commission's guideline power so that it became only a power to issue guidelines respecting the interpretation of the Act "in a class of cases": S.C. 1998, c. 9, s. 20(2).

9 At this time, the Commission, together with CTEA, CEP and Femmes Action, urged the Chairperson of the Tribunal to set formal hearing dates for the panel, so that the original complaints could at last be heard. Bell resisted, and a case-planning meeting before the Tribunal's Vice-chairperson was arranged at which Bell and the respondents put forward their positions. Bell argued that the 1998 amendments did not eliminate the problems of procedural fairness that had been identified by McGillis J. The Vice-chairperson rejected Bell's position, and, in an interim decision of April 26, 1999, directed that the hearings should proceed: Can. H.R. Trib., Decision No. 1 in file T503/2098.

10 Bell then applied for judicial review of this decision. The Federal Court, Trial Division allowed the application: *Bell Canada v. Canada (Human Rights Commission)*, [2001] 2 F.C. 392. Tremblay-Lamer J. held that even the narrowed guideline power of the Commission unduly fettered the Tribunal, and that the Chairperson's discretionary power to extend appointments did not leave Tribunal members with a sufficient guarantee of tenure.

11 The Commission, CTEA, CEP and Femmes Action appealed. Before the Federal Court of Appeal, Bell argued that the Tribunal violated not only the requirements of procedural fairness, but also Bell's right to a fair hearing under s. 2(*e*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44 (reproduced in R.S.C. 1985, App. III). The Federal Court of Appeal rejected Bell's view that the Tribunal violated the requirements of procedural fairness, and held it unnecessary to consider the arguments based on the *Canadian Bill of Rights*: [2001] 3 F.C. 481, 2001 FCA 161.

12 It is on appeal from this decision of the Federal Court of Appeal that the parties now appear before this Court — thirteen years after the filing of the respondents' original complaints, which still have yet to be heard.

III. Relevant Statutory Provisions

13 *Canadian Human Rights Act*, R.S.C. 1985, c. H-6

11. (1) It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.

. . .

(4) Notwithstanding subsection (1), it is not a discriminatory practice to pay to male and female employees different wages if the difference is based on a factor prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be a reasonable factor that justifies the difference.

. . .

27. . . .

(2) The Commission may, on application or on its own initiative, by order, issue a guideline setting out the extent to which and the manner in which, in the opinion of the Commission, any provision of this Act applies in a class of cases described in the guideline.

(3) A guideline issued under subsection (2) is, until it is revoked or modified, binding on the Commission and any member or panel assigned under subsection 49(2) with respect to the resolution of a complaint under Part III regarding a case falling within the description contained in the guideline.

48.2 (1) The Chairperson and Vice-chairperson are to be appointed to hold office during good behaviour for terms of not more than seven years, and the other members are to be appointed to hold office during good behaviour for terms of not more than five years, but

> the Chairperson may be removed from office by the Governor in Council for cause and the Vice-chairperson and the other members may be subject to remedial or disciplinary measures in accordance with section 48.3.
>
> (2) A member whose appointment expires may, with the approval of the Chairperson, conclude any inquiry that the member has begun, and a person performing duties under this subsection is deemed to be a part-time member for the purposes of sections 48.3, 48.6, 50 and 52 to 58.
>
> **50.** . . .
>
> (2) In the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determining the matter.

Canadian Bill of Rights, S.C. 1960, c. 44 (reproduced in R.S.C. 1985, App. III)

> **2.** Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> . . .
>
> (*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

IV. Issues

14 By order of the Chief Justice dated July 10, 2002, the following constitutional questions were stated for the Court's consideration:

(1) Are ss. 27(2) and (3) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended, inconsistent with s. 2(*e*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, and the constitutional principle of adjudicative independence and therefore inoperable or inapplicable?

(2) Are ss. 48.1 and 48.2 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended, inconsistent with s. 2(*e*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, and the constitutional principle of adjudicative independence and therefore inoperable and inapplicable?

V. Analysis

15 Bell argues that the power of the Commission to issue guidelines binding on the Tribunal, under ss. 27(2) and 27(3), compromises the Tribunal's independence because it places limits upon how the Tribunal can interpret the Act, and undermines the Tribunal's impartiality because the Commission is itself a party before the Tribunal. Similarly, Bell argues that the discretionary power of the Tribunal Chairperson to extend members' terms for ongoing inquiries, under ss. 48.2(1) and 48.2(2), compromises the Tribunal's independence because it threatens their security of tenure, and undermines the Tribunal's impartiality because the Chairperson may pressure such members to reach outcomes that he or she favours.

16 Since Bell's arguments draw upon both independence and impartiality, it will be useful to begin by discussing the distinction between these two requirements of procedural fairness.

A. *The Distinction Between Independence and Impartiality*

17 The requirements of independence and impartiality at common law are related. Both are components of the rule against bias, *nemo debet esse judex in propria sua causa*. Both seek to uphold public confidence in the fairness of administrative agencies and their decision-making procedures. It follows that the legal tests for independence and impartiality appeal to the perceptions of the reasonable, well-informed member of the public. Both tests require us to ask: what would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude? (See *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, *per* de Grandpré J., dissenting.)

18 The requirements of independence and impartiality are not, however, identical. As Le Dain J. wrote in *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 685 (cited by Gonthier J. in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 41):

> Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" . . . connotes absence of bias, actual or perceived. The word "independent" in s. 11(*d*) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

19 As noted above, Bell challenges both the Tribunal's independence and its impartiality. However, the above discussion of the difference between the two requirements suggests that one of Bell's challenges involves a category mistake. Bell's claim that the guideline power undermines the Tribunal's independence is based upon the contention that it threatens members' independence of thought. But the requirement of independence pertains to the structure of tribunals, and to the relationship between their members and others, including members of other branches of government, such as the executive. The test does not have to do with independence of thought. A tribunal must certainly exercise independence of thought, in the sense that it must not be unduly influenced by improper considerations. But this is just another way of saying that it must be impartial. Bell's only real objection to the guideline power, then, is that it leaves the Tribunal insufficiently impartial.

20 We will look first at this objection to the guideline power, and will then turn to Bell's two objections to the power of the Chairperson to extend appointments. Before doing so, however, we must determine the precise content of the requirements of impartiality and independence that apply to the Tribunal. How high a degree of independence is required? And what constitutes impartiality in this particular context?

B. *Content of the Requirements of Procedural Fairness Applicable to the Tribunal*

21 The requirements of procedural fairness — which include requirements of independence and impartiality — vary for different tribunals. As Gonthier J. wrote in *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at pp. 323-24: "the rules of natural justice do not have a fixed content irrespective of the nature of the tribunal and of the institutional constraints it faces". Rather, their content varies. As Cory J. explained in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at p. 636, the procedural requirements that

apply to a particular tribunal will "depend upon the nature and the function of the particular tribunal" (see also *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at para. 82, and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 21-22, *per* L'Heureux-Dubé J.). As this Court noted in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52, administrative tribunals perform a variety of functions, and "may be seen as spanning the constitutional divide between the executive and judicial branches of government" (para. 24). Some administrative tribunals are closer to the executive end of the spectrum: their primary purpose is to develop, or supervise the implementation of, particular government policies. Such tribunals may require little by way of procedural protections. Other tribunals, however, are closer to the judicial end of the spectrum: their primary purpose is to adjudicate disputes through some form of hearing. Tribunals at this end of the spectrum may possess court-like powers and procedures. These powers may bring with them stringent requirements of procedural fairness, including a higher requirement of independence (see *Newfoundland Telephone*, at p. 638, *per* Cory J., and *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.)).

22 To say that tribunals span the divide between the executive and the judicial branches of government is not to imply that there are only two types of tribunals — those that are quasi-judicial and require the full panoply of procedural protections, and those that are quasi-executive and require much less. A tribunal may have a number of different functions, one of which is to conduct fair and impartial hearings in a manner similar to that of the courts, and yet another of which is to see that certain government policies are furthered. In ascertaining the content of the requirements of procedural fairness that bind a particular tribunal, consideration must be given to all of the functions of that tribunal. It is not adequate to characterize a tribunal as "quasi-judicial" on the basis of one of its functions, while treating another aspect of the legislative scheme creating this tribunal — such as the requirement that the tribunal follow interpretive guidelines that are laid down by a specialized body with expertise in that area of law — as though this second aspect of the legislative scheme were external to the true purpose of the tribunal. All aspects of the tribunal's structure, as laid out in its enabling statute, must be examined, and an attempt must be made to determine precisely what combination of functions the legislature intended that tribunal to serve, and what procedural protections are appropriate for a body that has these particular functions.

23 The main function of the Canadian Human Rights Tribunal is adjudicative. It conducts formal hearings into complaints that have been referred to it by the Commission. It has many of the powers of a court. It is empowered to find facts, to interpret and apply the law to the facts before it, and to award appropriate remedies. Moreover, its hearings have much the same structure as a formal trial before a court. The parties before the Tribunal lead evidence, call and cross-examine witnesses, and make submissions on how the law should be applied to the facts. The Tribunal is not involved in crafting policy, nor does it undertake its own independent investigations of complaints: the investigative and policy-making functions have deliberately been assigned by the legislature to a different body, the Commission.

24 The fact that the Tribunal functions in much the same way as a court suggests that it is appropriate for its members to have a high degree of independence from the executive branch. A high

degree of independence is also appropriate given the interests that are affected by proceedings before the Tribunal — such as the dignity interests of the complainant, the interest of the public in eradicating discrimination, and the reputation of the party that is alleged to have engaged in discriminatory practices. There is no indication in the Act that the legislature intended anything less than a high degree of independence of Tribunal members. Members' remuneration is fixed by the Governor in Council, and is not subject to their performance on the Tribunal: s. 48.6(1). Members hold office for a fixed term of up to five years (or up to seven years, in the case of the Chairperson and Vice-chairperson) (s. 48.2(1)); and their terms may only be extended to enable them to finish a hearing that they have already commenced. Further, the Chairperson is removable only for cause; and before a member is disciplined or removed, the Chairperson may request the Minister of Justice to look into the situation, who in turn may request the Governor in Council to appoint a judge to conduct a full inquiry (s. 48.3). All of these features of the statutory scheme suggest that the legislature intended the Tribunal to exhibit a high degree of independence from the executive branch.

25 We turn now to impartiality. The same test applies to the issue of impartiality as applies to independence (*R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 143, *per* Lamer C.J., citing *Valente*, *supra*, at pp. 684 and 689). Whether the Tribunal is impartial depends upon whether it meets the test set out by de Grandpré J. in *Committee for Justice and Liberty*, *supra*, at p. 394: would a well-informed person, viewing the matter realistically and practically, have a reasonable apprehension of bias in a substantial number of cases? As Lamer C.J. stated in *Lippé*, allegations of institutional bias can be brought only where the impugned factor will give a fully informed person a reasonable apprehension of bias in a substantial number of cases (p. 144).

26 In answering this question, we must attend not only to the adjudicative function of the Tribunal, but also to the larger context within which the Tribunal operates. The Tribunal is part of a legislative scheme for identifying and remedying discrimination. As such, the larger purpose behind its adjudication is to ensure that governmental policy on discrimination is implemented. It is crucial, for this larger purpose, that any ambiguities in the Act be interpreted by the Tribunal in a manner that furthers, rather than frustrates, the Act's objectives. For instance, as the intervener Canadian Labour Congress argued before this Court, it would be counterproductive if the Tribunal were, in pay equity disputes, to compare the value of different forms of work using a method that itself rests on discriminatory attitudes. This would perpetuate discrimination, rather than helping to eradicate it. In endowing the Commission with the power to issue interpretive guidelines, and in binding the Tribunal to observe these guidelines, the legislature has attempted to guard against this possibility. The Act therefore evinces a legislative intent, not simply to establish a Tribunal that functions by means of a quasi-judicial process, but also to limit the interpretive powers of the Tribunal in order to ensure that the legislation is interpreted in a non-discriminatory way. The fact that the legislature regarded such limits as necessary for the fulfilment of the ultimate purpose of the Act must be borne in mind in determining precisely which sorts of fetters on the Tribunal's decision-making power adversely affect its impartiality, and which do not.

27 Our analysis has, thus far, looked to the statute and its overall purpose in determining the appropriate content for the requirements of independence and impartiality that apply to the Tribunal.

However, the content of the requirements of procedural fairness applicable to a given tribunal depends not only upon the enabling statute but also upon applicable quasi-constitutional and constitutional principles.

28 Here, the *Canadian Bill of Rights*, quasi-constitutional legislation, applies. Section 2(*e*) of the *Canadian Bill of Rights* requires that parties be given a "fair hearing in accordance with the principles of fundamental justice". Canadian courts have held that the content of s. 2(*e*) is established by reference to common law principles of natural justice (*Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at pp. 229-30; *Canada (Attorney General) v. Central Cartage Co.*, [1990] 2 F.C. 641 (C.A.), at pp. 663-64). As the parties in the case at bar did not suggest that the guarantees of independence and impartiality under s. 2(*e*) would in this case differ from the common law requirements of procedural fairness, it is unnecessary for us here to devote separate discussion to the *Canadian Bill of Rights*.

29 Bell also argues that the Tribunal is bound by a constitutional principle — the "unwritten principle of judicial independence" — which confers on it the same degree of independence as a court established under s. 96 of the *Constitution Act, 1867*: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3. Bell presents no authority for this argument. As an administrative tribunal subject to the supervisory powers of s. 96 courts, the Tribunal does not have to replicate all features of a court. As discussed above, the legislature has conferred a high degree of independence on the Tribunal, stopping short of constituting it as a court, but nevertheless supporting it by safeguards adequate to its function.

30 Bell suggests, in the alternative, that the constitutional principle applies and holds the Tribunal to the standard of common law procedural fairness. Since, as discussed below (at para. 53), the common law standard is met, this submission does not advance Bell's argument.

31 This discussion shows that the Tribunal, though not bound to the highest standard of independence by the unwritten constitutional principle of adjudicative independence, must act impartially and meet a relatively high standard of independence, both at common law and under s. 2(*e*) of the *Canadian Bill of Rights*.

32 We turn now to Bell's challenges to the Tribunal.

C. *The Guideline Power*

33 Bell alleges that the Commission's power to issue binding guidelines regarding the proper

interpretation of the Act undermines the Tribunal's impartiality. In Bell's words, this provision "usurps the power of the Tribunal to make its own decisions concerning the interpretation and application of the Act". Moreover, Bell argues, it is problematic that the Commission, the body that directs the Tribunal in its interpretation of the Act, also appears before the Tribunal as a party.

34 It is unclear exactly what objection Bell is making here. On one reading, Bell's objection lies simply with the fact that the Tribunal is "fettered" — that is, that it does not have full freedom to interpret the Act in whatever manner that it wishes, unconstrained by any other body. On a second reading, the objection is rather that the fact that the Commission has the power to issue binding guidelines may make the Tribunal more likely to favour the Commission in the proceedings before it. On a third reading, the objection is simply to the fact that Parliament has placed in one and the same body the functions of investigating complaints, formulating guidelines, and acting as prosecutor in hearings before the Tribunal. The objection is that this overlap of functions itself gives rise to a reasonable apprehension of bias. Finally, on a fourth reading, Bell is objecting that the Commission may use its guideline power to manipulate the outcome of a particular case, to ensure that it succeeds as prosecutor. We shall consider each of these versions of the objection, in turn.

35 In oral argument, counsel for Bell stated repeatedly that the guideline power "fetters" the Tribunal in its application of the Act. This assumes that the sole mandate of the Tribunal is to apply the Act, and not also to apply any other forms of law that the legislature has deemed relevant — such as guidelines. This assumption is mistaken. If the guidelines issued by the Commission are a form of law, then the Tribunal is bound to apply them, and it is no more accurate to say that they "fetter" the Tribunal than it is to suggest that the common law "fetters" ordinary courts because it prevents them from deciding the cases before them in any way they please.

36 It might be contended that ss. 27(2) and 27(3) of the Act do not adequately empower the Commission to issue valid subordinate legislation, and that consequently, the guidelines are not "law". In our view, this view is incorrect. The guidelines issued by the Commission under the Act are indistinguishable from regulations issued by other administrative bodies (see *Canada (Attorney General) v. Public Service Alliance of Canada*, [2000] 1 F.C. 146 (T.D.), at paras. 136-41, *per* Evans J., as he then was). They are, like regulations, of general application: indeed, under the amended s. 27(2), they must pertain always to "a class of cases". Like regulations, the Commission's guidelines are subject to the *Statutory Instruments Act*, R.S.C. 1985, c. S-22, and must be published in the *Canada Gazette*. Moreover, the process that is followed in formulating particular guidelines resembles the legislative process, involving formal consultations with interested parties and revision of the draft guidelines in light of these consultations. The *Equal Wages Guidelines, 1986*, SOR/86-1082, for instance, were the result of consultation with some 70 organizations, including Bell. The Commission met with all organizations who requested a meeting; and, as a direct result of the consultation process, Commission staff made changes to the draft guidelines prior to their submission to the Commission for approval.

37 While it may have been more felicitous for Parliament to have called the Commission's power a power to make "regulations" rather than a power to make "guidelines", the legislative intent is clear. A functional and purposive approach to the nature of these guidelines reveals that they are a form of law, akin to regulations. It is also worth noting that the word used in the French version of the Act is *ordonnance* — which leaves no doubt that the guidelines are a form of law.

38 The objection that the guideline power unduly fetters the Tribunal overlooks the fact that guidelines are a form of law. It also mistakenly conflates impartiality with complete freedom to decide a case in any manner that one wishes. Being fettered by law does not render a tribunal partial, because impartiality does not consist in the absence of all constraints or influences. Rather, it consists in being influenced only by relevant considerations, such as the evidence before the Tribunal and the applicable laws. As Scalia J. pointed out in *Liteky v. United States*, 510 U.S. 540 (1994), at p. 550, the words "bias" and "partiality" "connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess" (emphasis in the original). Similarly, as Cory J. emphasized in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 119, not all predispositions amount to "bias". Predispositions that simply reflect applicable law do not undermine impartiality. On the contrary, they help to preserve it. Hence, the fact that the Tribunal must apply all relevant law, including guidelines formulated by the Commission, does not on its own raise a reasonable apprehension of bias.

39 The second version of Bell's objection is that the Tribunal is more likely to favour the Commission during a hearing because the Commission has the power to issue guidelines that bind it. It is not evident to us why this would be so. When the Commission appears before the Tribunal, it is in no different a position from any representative of the government who appears before an administrative board or court. The public does not, in other contexts, assume that a decision-maker will favour submissions by government representatives simply because the decision-maker must apply laws that the government has made. The Tribunal seems no more likely to be biased in favour of the Commission because the Commission provides the Tribunal's guidelines than it is likely to be biased in favour of Bell because Bell provides the Tribunal's phone service.

40 On a third interpretation, Bell objects that Parliament has placed in one and the same body the function of formulating guidelines, investigating complaints, and acting as prosecutor before the Tribunal. Bell is correct in suggesting that the Commission shares these functions. However, this overlapping of different functions in a single administrative agency is not unusual, and does not on its own give rise to a reasonable apprehension of bias (see *Régie des permis d'alcool*, *supra*, at paras. 46-48, *per* Gonthier J.; *Newfoundland Telephone*, *supra*, at p. 635, *per* Cory J.; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301). As McLachlin C.J. observed in *Ocean Port*, *supra*, at para. 41, "[t]he overlapping of investigative, prosecutorial and adjudicative functions in a single agency is frequently necessary for [an administrative agency] to effectively perform its intended role".

41 Indeed, it may be that the overlapping of functions in the Commission is the legislature's way of ensuring that both the Commission and the Tribunal are able to perform their intended roles. In *Public Service Alliance*, *supra*, Evans J. noted that although it was unusual for Parliament to have conferred the power to make subordinate legislation on the Commission and not the Governor in Council, Parliament must have contemplated that "the expertise that the Commission will have acquired in the discharge of its statutory responsibilities for human rights research and public education, and for processing complaints up to the point of adjudication" (para. 140) was necessary in the formulation of the guidelines, and was more important than certain other goals. In our view, Evans J.'s conjecture regarding Parliamentary intent is correct. The Commission is responsible, among other things, for maintaining close liaisons with similar bodies in the provinces, for considering recommendations from public interest groups and any other bodies, and for developing programs of public education (s. 27(1)). These collaborative and educational responsibilities afford it extensive awareness of the needs of the public, and extensive knowledge of developments in anti-discrimination law at the federal and provincial levels. Placing the guideline power in the hands of the Commission may therefore have been Parliament's way of ensuring that the Act would be interpreted in a manner that was sensitive to the needs of the public and to developments across the country, and hence, that it would be interpreted by the Tribunal in the manner that best furthered the aims of the Act as a whole.

42 This point is related to our earlier discussion of the importance of considering the aims of the Act as a whole, in assessing whether the requirement of impartiality has been met. We noted there that the Act's ultimate aim of identifying and rectifying instances of discrimination would only be furthered if ambiguities in the Act were interpreted in a manner that furthered, rather than frustrated, the identification of discriminatory practices. If, as the Act suggests, this can best be accomplished by giving the Commission the power to make interpretive guidelines that bind the Tribunal, then the overlapping of functions in the Commission plays an important role. It does not result in a lack of impartiality, but rather helps to ensure that the Tribunal applies the Act in the manner that is most likely to fulfill the Act's ultimate purpose.

43 We note in passing that, given the relatively small volume of s. 11 equal pay cases adjudicated by the Tribunal, the promulgation of guidelines by the Commission has likely provided parties with a sense of their rights and obligations under the Act in a more efficient and clearer way than would an incremental development of informal guidelines by the Tribunal itself, through its decisions in particular cases.

44 Bell's real objection may be that placing the guideline power and the prosecutorial function in a single agency allows the Commission to manipulate the outcome of a hearing in its favour.

45 This version of Bell's objection might have been stronger had Bell provided some evidence that, in practice, the Commission had attempted to use the guidelines to influence the Tribunal's views toward it (see *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405, and *Matsqui*

Indian Band, *supra*, at paras. 117-24, *per* Sopinka J.). No such evidence was provided in this case. Indeed, since the only guidelines that apply to the complaints brought against Bell are the *Equal Wages Guidelines, 1986*, which were introduced several years before the complaints against Bell were brought, it is difficult to see how these guidelines could have been formulated with the aim of unduly influencing the Tribunal against Bell.

46 In suggesting that the Commission could misuse its guideline power in this way, and that the misuse could remain undetected, Bell seems to be overestimating the breadth of the guideline power. Indeed, counsel for Bell suggested in oral argument that the guideline power would permit the Commission effectively to repeal provisions of the Act. Counsel also argued that the guideline power might be used to strip away any procedural protections guaranteed in the Act, and that the Tribunal has no power to "escape the fetters of any guidelines imposed on it by declaring them *ultra vires* the Commission".

47 As the Commission has readily acknowledged, the guideline power is constrained. The Commission, like other bodies to whom the power to make subordinate legislation has been delegated, cannot exceed the power that has been given to it and is subject to strict judicial review: *R. v. Greenbaum*, [1993] 1 S.C.R. 674. The Tribunal can, and indeed must, refuse to apply guidelines that it finds to be *ultra vires* the Commission as contrary to the Commission's enabling legislation, the Act, the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*. The Tribunal's power to "decide all questions of law or fact necessary to determining the matter" under s. 50(2) of the Act is clearly a general power to consider questions of law, including questions pertaining to the *Charter* and the *Canadian Bill of Rights*: see *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854. No invalid law binds the Tribunal. Moreover, the Commission's guidelines, like all subordinate legislation, are subject to the presumption against retroactivity. Since the Act does not contain explicit language indicating an intent to dispense with this presumption, no guideline can apply retroactively. This is a significant bar to attempting to influence a case that is currently being prosecuted before the Tribunal by promulgating a new guideline. Finally, any party before the Tribunal could challenge a guideline on the basis that it was issued by the Commission in bad faith or for an improper purpose; and no guideline can purport to override the requirements of procedural fairness that govern the Tribunal.

48 In addition to these factors, there are specific indications in the Act that the legislature intended the scope of the guideline power to be limited. In determining the reach of this power, both language versions of s. 27(2) must be read harmoniously. The English version, which empowers the Commission to "issue a guideline setting out the extent to which and the manner in which, in the opinion of the Commission, any provision of this Act applies in a class of cases", must be read in such a way as to be coherent with the French version. The French version states that the Commission can, in a category of given cases, "*décider de préciser, par ordonnance, les limites et les modalités de l'application de la présente loi*". This power to "make precise the limits and the modes of application of the law" certainly falls short of the power to repeal portions of the Act which Bell fears. An apt example of what is involved in merely "making precise" the limits of the Act is provided by s. 11(4), which envisions that guidelines will be promulgated to list the factors (*facteur reconnu*) which would justify what might otherwise amount to discrimination under s. 11(1). This provision clearly

contemplates guidelines adding precision to the Act, without in any way trumping or overriding the Act itself.

49 It is of course true that by "making precise" various provisions of the Act, the guidelines will affect the outcome of cases. However, they will only risk undermining the impartiality of the Tribunal if they do so in a manner that is unjust or improper. Given the many constraints on the Commission's guideline power, and the many ways in which the Tribunal is empowered to question or set aside guidelines that are in violation of the law, it does not seem likely that the Commission's guidelines could improperly influence the Tribunal.

50 Parliament's choice was obviously that the Commission should exercise a delegated legislative function. Like all powers to make subordinate legislation, the Commission's guideline power under ss. 27(2) and 27(3) is strictly constrained. We fail to see, then, that the guideline power under the Act would lead an informed person, viewing the matter realistically and practically and having thought the matter through, to apprehend a "real likelihood of bias": *S. (R.D.)*, *supra*, at para. 112, *per* Cory J.; *Committee for Justice and Liberty*, *supra*, at p. 395, *per* de Grandpré J.

D. *The Chairperson's Power to Extend Appointments*

51 Bell challenges the Chairperson's power to extend appointments of Tribunal members in ongoing inquiries. Bell argues that this power robs members of the Tribunal of sufficient security of tenure. In addition, Bell contends that it threatens members' impartiality.

52 There is an obvious need for flexibility in allowing members of the Tribunal to continue beyond the expiry of their tenure, in light of the potential length of hearings and the difficulty of enlisting a new member of a panel in the middle of a lengthy hearing. It would not, for this reason, be practicable to suggest that members simply retire from a panel upon the expiry of their appointment, with no official having the power to extend their appointments. And of the officials who could exercise this power, the Tribunal Chairperson seems most likely both to be in a good position to know how urgent the need to extend an appointment is and also to be somewhat distant from the Commission.

53 In any case, the question of whether this power compromises the independence of Tribunal members is settled by *Valente*, *supra*. That case concerned legislation that conferred a discretionary power upon the Chief Justice of the provincial court to permit judges who had attained retirement age to hold office until the age of 70, and that conferred a discretionary power upon the Judicial Council for Provincial Judges to further approve the extension of a judge's term of office from age 70 to 75. Prior to amendments in the legislation, these powers had rested with the executive. At p.

704, Le Dain J. wrote of the amendments that:

> This change in the law, while creating a post-retirement status that is by no means ideal from the point of view of security of tenure, may be said to have removed the principal objection to the provision . . . since it replaces the discretion of the Executive by the judgment and approval of senior judicial officers who may be reasonably perceived as likely to act exclusively out of consideration for the interests of the Court and the administration of justice generally.

In our view, this passage resolves the question. If the discretionary power of the Chief Justice and Judicial Council of the provincial courts to extend the tenure of judges does not compromise their independence in a manner that contravenes the requirements of judicial independence, then neither does the discretionary power of the Tribunal Chairperson compromise the independence of Tribunal members in a manner that contravenes common law procedural fairness.

54 It remains to consider Bell's claim that this power undermines the Tribunal's impartiality. Bell's argument here seems to be that members might feel pressure to adopt the views of the Chairperson in order to remain on a panel beyond the expiry of their appointment, and that because of this, a reasonable person might doubt whether members were guided only by legitimate considerations in the disposition of their final case. However, given that members whose appointments have expired will not sit on another panel again, it is difficult to see what power the Chairperson could ultimately have over them, once their appointments have been extended and it is time for them to decide the case. Moreover, there are ample provisions in the Act to suggest that the Tribunal Chairperson can reasonably be regarded as disinterested in the outcome of cases. The Chairperson must have been a member in good standing in the bar of a province for at least ten years (s. 48.1(3)). He or she can be removed from the position for cause (s. 48.2(1)) by the Governor in Council. A reasonable person informed of these facts would not conclude that members were likely to be illegitimately pressured to adopt the Chairperson's views.

VI. Conclusion

55 We would therefore uphold the conclusions of the Federal Court of Appeal, and dismiss the appeal with costs. The constitutional questions should be answered as follows:

(1) Are ss. 27(2) and (3) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended, inconsistent with s. 2(*e*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, and the constitutional principle of adjudicative independence and therefore inoperable or inapplicable?

Answer: No.

(2) Are ss. 48.1 and 48.2 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended, inconsistent with s. 2(*e*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, and the constitutional principle of adjudicative independence and therefore inoperable and inapplicable?

Answer: No.

Appeal dismissed with costs.

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